

Before the Board considers the issue raised by respondent, it must determine whether it has jurisdiction to consider this matter. The Act limits appeals from preliminary hearing orders to instances where disputes involving certain jurisdictional issues are brought before the Board.¹ These jurisdictional issues include whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made or whether certain defenses apply.²

Claimant argues that the present appeal is an effort to relitigate the issues addressed by an earlier preliminary hearing Order which respondent did not appeal.³ Claimant further argues that "[t]he failure of respondent to timely appeal from the June 23, 2003 Order results in a lack of jurisdiction for an appeal from the later [August 29, 2003] Order."⁴

Claimant's argument is misplaced. The Act⁵ does not limit the number of preliminary hearings that can be held on any claim. All that is required is for a party to make a demand, file the statutorily required application for hearing and provide notice. Here, respondent obtained additional evidence bearing upon the causative aspects of claimant's claim and moved to terminate benefits. Respondent served a seven-day notice upon claimant and thereafter filed a request for preliminary hearing, all as contemplated by the Act. The fact that respondent chose not to appeal an earlier preliminary hearing Order is of no consequence to the pending appeal.

Moreover, respondent articulates an issue that falls squarely within the Board's jurisdiction when considering appeals from preliminary hearing orders. Respondent contends that claimant's present need for treatment is due to a pre-existing congenital condition and not due to an injury that arose out of and in the course of his employment. Accordingly, the Board finds that it has jurisdiction to hear respondent's appeal.

Turning now to the substantive issue, the Board finds that the ALJ's Order should be affirmed.

¹ K.S.A. 44-534a and K.S.A. 2002 Supp. 44-551.

² K.S.A. 44-534a.

³ The first preliminary hearing was held on May 29, 2003, and was followed by an Order dated June 23, 2003.

⁴ Claimant's Brief at 1 (filed Sept. 26, 2003).

⁵ K.S.A. 44-501 *et seq.*

Following a preliminary hearing held on May 29, 2003, the ALJ entered an Order directing Dr. Pedro Murati to conduct an independent medical examination to determine whether claimant's present low back complaints were "related to his employment" with respondent.⁶ Dr. Murati performed the court-ordered examination and reported to both the ALJ and counsel that it was his belief that claimant had "an aggravation and an acceleration of a pre-existing condition that occurred on 01-22-03, during the patient's employment with Koch-Glitch [*sic*]."⁷ Dr. Murati recommended conservative medical treatment and opined that claimant was and had been temporarily and totally disabled as a result of the work-related accident. Thereafter, the ALJ entered an Order directing respondent to provide temporary total disability benefits as well as the conservative treatment reflected in Dr. Murati's report.

Respondent referred claimant to Dr. Paul Stein for an additional evaluation on June 10, 2003. Contrary to respondent's suggestion, Dr. Stein does not conclude that "any need for treatment claimant currently has is due to his preexisting congenital condition and not to any aggravation suffered on January 22, 2003."⁸ Dr. Stein's report does point out some discrepancies in claimant's recitation of the facts and circumstances surrounding his present condition. However, that same report specifically states as follows:

In summary, there was a preexisting and symptomatic spinal condition which may or may not have been aggravated, to some degree, by work activity on 1/22/03. That is a question for the legal system to ultimately decide.⁹

Dr. Stein goes on to state that "any need for care is *much more related* to the prior condition than to any such aggravation, since the condition was already symptomatic."¹⁰ Dr. Stein did suggest that, independent of the causation aspect, claimant could benefit from conservative treatment very similar to that outlined by Dr. Murati.

Upon receipt of Dr. Stein's report, respondent moved to terminate claimant's temporary total disability benefits and medical treatment arguing, once again, that claimant's present need for treatment did not arise out of any injury or aggravation that arose out of or in the course of his employment with respondent.

⁶ Order (May 30, 2003).

⁷ Murati's Report (June 17, 2003).

⁸ Respondent's Brief at 7 (filed Sept. 22, 2003).

⁹ P.H. Trans. (Aug. 28, 2003), Resp. Ex. 1 at 5.

¹⁰ *Id.* (emphasis added).

At the preliminary hearing held on August 28, 2003, the ALJ took this matter under consideration and concluded that claimant had sustained a temporary aggravation to an underlying condition and remained entitled to the conservative treatment recommended by Dr. Murati. It is this determination that respondent appeals.

Respondent's brief, when distilled to its essence, argues that because claimant had a well-documented pre-existing low back problem and because he was less than credible, he is not entitled to the medical treatment that was ordered by the ALJ and also that his claim should be dismissed. As for the credibility issue, the ALJ had an opportunity to see the claimant and evaluate that aspect of the claim. The ALJ was apparently persuaded that the claimant's failure to fully disclose the full extent of his chiropractic care to Dr. Murati or to Dr. John McMaster did not invalidate Dr. Murati's opinions with regard to the aggravation of claimant's underlying low back problem.

As for the existence of the pre-existing low back problems, Dr. Murati affirmatively stated that claimant sustained an aggravation and/or an acceleration of his underlying condition. Dr. Stein was less definitive, in that he said the pre-existing spinal condition "may or may not have been aggravated, to some degree, by work activity."¹¹ Given these two opinions, the ALJ concluded claimant sustained an aggravation of his underlying condition. It is well-settled in Kansas law that if an employee suffers an injury that accelerates, intensifies or exacerbates a pre-existing condition, compensation is available.¹² The ALJ concluded that claimant suffered a temporary aggravation. The Board finds no reason to disturb this finding based upon the record as it has thus far developed. Of course, these findings are subject to further review upon a full presentation of the facts.¹³

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated August 29, 2003, is hereby affirmed.

IT IS SO ORDERED.

¹¹ P.H. Trans. (Aug. 28, 2003), Resp. Ex. 1 at 5.

¹² *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 121, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

¹³ K.S.A. 44-534a.

Dated this _____ day of October, 2003.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
 Janell Jenkins Foster, Attorney for Respondent
 Jon L. Frobish, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director